

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19~~19~~13

No. [REDACTED] 83

THE UNITED STATES, APPELLANT,

vs.

SIMON NORMILE, JOHN A. FASTABEND, AND WILLIAM F. McGREGOR, LATE PARTNERS AS NORMILE, FASTABEND AND McGREGOR,

and

No. [REDACTED] 84

SIMON NORMILE, JOHN A. FASTABEND, AND WILLIAM F. McGREGOR, LATE PARTNERS AS NORMILE, FASTABEND AND McGREGOR, APPELLANTS,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED MARCH 21, 1914.

(24090, 24091)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 385.

THE UNITED STATES, APPELLANT,

vs.

SIMON NORMILE, JOHN A. FASTABEND, AND WILLIAM F. McGREGOR, LATE PARTNERS AS NORMILE, FASTABEND AND McGREGOR,

and

No. 386.

SIMON NORMILE, JOHN A. FASTABEND, AND WILLIAM F. McGREGOR, LATE PARTNERS AS NORMILE, FASTABEND AND McGREGOR, APPELLANTS,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition.....	1	1
Traverse.....	14	8
Argument and final submission.....	15	9
Findings of fact, as finally found, and conclusion of law.....	16	9, 14
Opinion of the court.....	21	14
Judgment of the court.....	25	17
Application of defendants for, and allowance of, appeal.....	26	17
Application of claimants for, and allowance of, cross appeal.....	27	18
Certificate.....	28	18



I. *Petition. Filed June 13, 1905.*

In the Court of Claims.

SIMON NORMILE, JOHN A. FASTABEND, AND
Wm. F. McGregor, late partners as Nor- } No. 28041.
mile, Fastabend, and McGregor.

PETITION.

To the honorable Chief Justice and Judges of the Court of Claims:

Your petitioners, Simon Normile, John A. Fastabend, and William F. McGregor, respectfully show to your honors the following-stated facts:

I.

Petitioners are citizens of the United States, residing in the State of Oregon. They were formerly, to wit, in the years 1898, 1899, and 1900, partners in business under the firm name of Normile, Fastabend & McGregor.

II.

On the 11th day of March, 1898, petitioners, as such firm, entered into a contract in writing with Captain W. L. Fisk, of the Corps of Engineers of the United States Army, in which they undertook to furnish material and make certain improvements in the Yamhill River, in the State of Oregon, said Captain Fisk, in awarding and signing the contract, acting for and in behalf of the United States. Said contract was approved on the 24th day of March, 1898, by the Chief of Engineers of the Army. Below is a copy of said contract.

This agreement entered into this eleventh day of March, eighteen hundred and ninety-eight, between Captain W. L. Fisk, Corps of Engineers, United States Army, of the first part, and Simon Normile, John A. Fastabend, and William F. McGregor, partners doing business under the firm name of Normile, Fastabend & McGregor, of Astoria, in the county of Clatsop, State of Oregon, of the second part, witnesseth, that, in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Captain W. L. Fisk, for and in behalf of the United States of America, and the said Normile, Fastabend & McGregor do covenant and agree, to and with each other, as follows:

That the said Normile, Fastabend & McGregor shall construct a lock, dam, keeper's dwelling, and other buildings on the Yamhill River and excavate a channel at Martins Shoal, in said river, subject to all the conditions and requirements of the specifications herewith. That the said W. L. Fisk, captain, Corps of Engineers, U. S. A., for and in behalf of the United States of America, shall pay the

said Normile, Fastabend & McGregor for materials furnished and placed at the following prices, to wit:

For excavation (earth), sixty-five cents (65c.) per cubic yard; for excavation (rock), lock and dam, one dollar and fifty cents (\$1.50) per cubic yard; for excavation (rock), Martins Shoal, five dollars and seventy-five cents (\$5.75) per cubic yard; for embankment, fifteen cents (15c.) per cubic yard; for piles, thirteen cents (13c.) per linear foot; for lumber, lock, dam, revetments, etc., twelve dollars (\$12.00) per 1,000 feet b. m.; for lumber, gates, and sills, thirty-two dollars (\$32.00) per 1,000 feet b. m.; for concrete, five dollars and forty-four cents (\$5.44) per cubic yard; for iron, wrought, four cents (4c.) per pound; for iron, cast, four cents (4c.) per pound; for drain pipe, twenty cents (20c.) per linear foot; for stone, one dollar and twenty-five cents (\$1.25) per cubic yard; for brush, one dollar and thirty-five cents (\$1.35) per cord; for keeper's dwelling, other buildings, etc., twenty-two hundred dollars (\$2,200.00), complete.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

The said Normile, Fastabend & McGregor shall commence work as prescribed by par. 41 of the specifications, and shall complete the keeper's dwelling, woodshed, walks, fences, etc., within 60 days from date of notification, and shall complete the whole work on or before the thirty-first day of December, eighteen hundred and ninety-eight (1898).

If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States, and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States: Provided, however, that if the party (or parties) of the second part shall be freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented

either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract,
4 such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

It is further understood and agreed that in case of failure
5 on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

Payments shall be made to the said Normile, Fastabend & McGregor monthly, when the work contracted for shall have been

delivered and accepted, reserving ten per cent from each payment until the whole work shall have been so delivered and accepted.

Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferor or the transferee, but all rights of action for any breach of this contract by said Normile, Fastabend & McGregor are reserved to the United States.

No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

A. L. UPSON	as to	W. L. FISK, <i>Captain, Corps of Engineers.</i>
FRANK SPITTLE	as to	SIMON NORMILE.
A. SCHUMAX	as to	JOHN A. FASTABEND.
H. G. SMITH	as to	WILLIAM F. McGREGOR.

(EXECUTED IN QUINTUPLETCATE.)

Approved March 24, 1898.

JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

Before said contract was signed a negotiation had been closed by which the United States should purchase the land required for the lock, dam, and keeper's dwelling provided for in the contract, and, for such acquisition of the land, nothing remained to be done except the actual execution of a deed, including its approval by the Chief of Engineers. Such a deed, having been executed by the vendor of the land, was on or before the 7th day of April, 1898, mailed by said Captain Fisk to the Chief of Engineers, at Washington, D. C., with a request that the reply of the Chief of Engineers, stating his action on the deed, should be sent by telegraph, and on said 7th day of April said Captain Fisk by letter apprised petitioners that he expected to receive such reply from the Chief of Engineers during the next week, but no information of any action upon the deed was received by said Captain Fisk until the 14th day of June, 1898, on which day he notified petitioners that the deed was approved and authorized them to proceed with the work.

This delay of the action of the Chief of Engineers was not in accordance with the ordinary practice of his office regarding such

conveyances of land or with the purpose of said parties in the execution of the contract for such improvements, their intention being that the deed should be promptly considered upon its receipt by the

Chief of Engineers and approved, if in proper form, to the end
7 that an early beginning might be made by petitioners upon the work. It was expected and intended, indeed, by petitioners and said Captain Fisk that the deed would be approved before said 7th day of April. On the 6th day of said month they wrote a letter to said Captain Fisk, reminding him of the importance of beginning on the work immediately, and his said communication to them of April 7th was his reply to that letter.

V.

In order that the work might be economically performed within the time fixed, it was, in fact, necessary that it should be commenced with that promptness which the parties intended, and that at least the keeper's dwelling, with a woodshed, walks, and fences should be completed within a little more than sixty days from said 11th day of March, the date of the signing of the contract, this being in effect the time fixed by the parties for the completion of that part of the project. It was expected that said river would, during the latter part of the spring, as usually occurs, be too high for work on the lock and dam; that before such spring flood the physical conditions would be favorable for the construction of said dwelling, shed, walks, and fences, and of concrete foundations for the lock and dam; that the usual water level of the early summer, following such flood, would afford the best opportunity of freighting upon the river the materials for the lock and dam, and that during the still lower stages of the water, occurring in the late summer and the autumn, the work of constructing the lock and dam could be advantageously performed.

8

VI.

Petitioners, in bidding on and contracting to construct said improvements, counted on being permitted to begin on the work within the few days ordinarily required for the transmission of a deed to the city of Washington and its approval by the Chief of Engineers. After sending to said Captain Fisk their said letter of April 6th, they waited for more than a month longer and then, to wit, about the middle of May, 1898, commenced to prepare materials for the keeper's dwelling, walks, and fences, but they could not safely and they did not make any substantial beginning on the construction of those parts of the improvements until the said authority to them, following on the approval of the deed, was given. When such authority was given them the spring rise of the river had already occurred, and the water was too high for any work to be done on the lock and dam, and they were not able to and did not lay the foundations and complete the preparations for those structures until after the middle of the

summer, the season of low water. When these preparations had been made and the rock and other materials for the lock and dam were ready to be transported, the river was so low that neither the necessary timbers nor the boats intended for the transportation of rock and other materials could be floated, and thus petitioners were required to and did remove shoals from the bed of the river and use freight boats of lighter draft and smaller carrying capacity, all to the great increase of the cost of the work.

VII.

In their efforts to complete said improvements within the time fixed by the contract, it was necessary that petitioners, after they were so delayed, should have parts of the work done, and they did have the same done, by subcontractors, and the prices paid by them to such subcontractors were much more than it would have cost petitioners themselves to do the same work. During a large part of the time they were also compelled to work and did work their own employees at night, as well as through the day, and necessarily paid considerably more than the cost of the same kinds of work when done by daylight.

VIII.

In bidding on and contracting to construct said improvements, petitioners estimated the cost of materials and labor at the prices then ruling in that region, which prices approximately had then obtained there for several years, and continued to rule thereafter until the latter part of the following April. From about April 25, 1898, the day on which Congress declared war to exist between the United States and Spain, and chiefly in consequence of said war, prices of all building materials and of labor advanced, and in the summer and autumn of 1898 and until the completion of said improvements petitioners were compelled to pay and did pay much larger prices than would have been available to them if they had not been prevented from proceeding with the work and buying their materials in the said first months of March and April.

IX.

Under specifications accompanying and adopted as a part of said contract, petitioners were to furnish and sink piles upon which to lay the foundation for said lock, the length of such piles to be determined by the United States engineer having general charge and superintendence of the work. When petitioners were authorized to proceed with their work, said Capt. Fisk, then in charge of the project, designated the length of the piles to be used and petitioners thereupon obtained piles of that length and delivered and drove some of the same; but said Captain Fisk then decided that longer piles

were needed, and at his direction petitioners cut and supplied a sufficient number of piles of this greater length, replacing with some of them the piles already driven but pronounced insufficient; which change caused additional delay in the performance and further increased the cost of the work.

X.

Said specifications also required that, for protection of the pit in which the foundation of the lock was to be laid, petitioners should construct and maintain until the completion of the work a cofferdam enclosing the entire site of the lock, a particular location for such cofferdam and the details of and in relation to its construction to be determined by said engineer with a view to its serving said purpose. In providing for such dam said engineer chose such a site and prescribed such a plan that it was not feasible to maintain the dam, the site being too remote from the dam and on a bottom of mud, instead of rock, and no arrangements being made to pass the water through or around a blind wall, constructed at the upper end of the lock, and so divert it from the cofferdam. Petitioners thereupon protested to said Captain Fisk against such site as unsuited to the purpose and impracticable and requested of him that they be permitted to make a culvert through said wall for passage of the water, but he ignored the protest and denied the request. Three cofferdams, therefore, were successively built by petitioners at much expense on the identical site and according to the plan prescribed by the engineer, and these in turn were destroyed by the water. Finally, the engineer then in charge, Captain W. C. Langfitt, permitted petitioners to cut such culvert and to build the cofferdam on another site suggested by them, but he would not consent that the United States should pay anything for the construction of the culvert. A fourth cofferdam was then built by the petitioners, and it remained unimpaired by the action of the water until the construction of the lock was completed.

XI.

After said losses were incurred by petitioners in their efforts to complete said improvements within the time prescribed, and after it became evident that this could not possibly be done, to wit, in December, 1898, the time for the completion of the work was extended by the Chief of Engineers, to November 1, 1899; and 12 new delays, not to be avoided by petitioners, having occurred in the year 1899, the time was similarly extended to October 25, 1900. Among the chief occasions for such extensions was the destruction of the several cofferdams, the third of which was washed away in the month of October, 1900. In the month of November, 1900, the work was completed, and the residue of the contract price was thereupon paid to petitioners.

XII.

Petitioners' said losses suffered through (1) the delay of commencement of their work and the resulting increase of the cost of the same; (2) the change of length of piles, and (3) the wrong location of and plan for the cofferdam and necessary rebuilding of the same and of constructing the culvert in the blind wall aggregate the sum of \$25,000, no part of which sum has been paid to them.

XIII.

A bill providing compensation to petitioners for their said losses suffered in and about their performance of their undertaking with the United States was introduced in the Senate of the 58th Congress and was, by a resolution of the Senate, passed on the 5th day of January, 1895, under the provisions of the act of Congress approved March 3, 1887, entitled "An act to provide for the bringing of suits against the United States," etc., referred to this court.

13 Petitioners pray for judgment against the United States in said sum of \$30,000.

SIMON NORMILE,
JOHN A. FASTABEND,
W. F. McGREGOR,
By BENJ. CARTER,
Their Attorney in Fact.

DISTRICT OF COLUMBIA, ss:

Before me, W. H. Woodwell, a notary public in and for said district, Benj. Carter, whose name is signed to the foregoing petition, being by me sworn, made oath that the allegations of said petition are true to the best of his knowledge, information, and belief.

BENJ. CARTER.

Subscribed and sworn to before me this 12th day of June, 1905.

W. H. WOODWELL,
Notary Public.

14 II. *Traverse. Filed May 12, 1913.*

In the Court of Claims of the United States. December term,
A. D. 1913.

NORMILE, FASTABEND & McGREGOR
vs.
THE UNITED STATES. } No. 28041.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.

15 *III. Argument and final submission of case.*

In the argument of this case, Mr. F. Carter Pope and Mr. Benjamin Carter were heard for the claimants and Mr. Philip M. Ashford for the defendants and the case was finally submitted May 12, 1913.

16 *IV. Findings of fact, as finally found, and conclusion of law filed December 1, 1913.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

Claimants are citizens of the United States, residing in the State of Oregon. In the years 1898, 1899, and 1900 they were partners in the business hereinafter described under the firm name of Normile, Fastabend & McGregor.

II.

On the 11th day of March, 1898, claimants entered into the written contract set forth in and made a part of the petition herein. Said contract provided for the construction of a lock and dam in the Yamhill River in the State of Oregon, a keeper's dwelling house and other accessory buildings, and for doing certain dredging in the channel of said river near the site of said lock and dam. Specification 41 of said contract provided:

"The sites for the lock, dam, and keeper's dwelling have not as yet been purchased by the United States, and no work will be commenced under this contract until the same are secured. Within ten days after the date of notification to the successful bidder that the above sites have been secured and the contract covered by these specifications has been approved, he must proceed with the work in a vigorous manner; he must complete the keeper's dwelling, woodshed, walks, fences, etc., within sixty days from date of notification, and the whole contract on or before December 31, 1898.

"Because of the spring rise of the Willamette and consequent overflow of the Yamhill it is probable that actual work on the lock and dam can not be begun by the contractor before June at the earliest.

17 "The above date of completion has been set, as it is desired that all work shall be finished during one low-water season, and the contractor should make his calculations accordingly."

Said contract was approved by the Chief of Engineers of the United States Army on March 24, 1898.

III.

The advertisement and specifications were dated and issued January 3, 1898. The general location of the lock and dam had been

previously determined and was tentatively shown on maps in the office of the district engineer of the United States at Portland, Oreg.

From June, 1897, to April, 1898, negotiations were in progress for the purchase of three tracts of land for the lock and dam and keeper's dwelling, respectively, and on February 21, 1898, after definite descriptions had been obtained from surveys, authority to purchase was requested by letter to the Chief of Engineers of that date. On March 10, 1898, just prior to the signing of the contract, authority to purchase was again requested by telegram, and was approved by telegram from the Chief of Engineers dated March 15, 1898, with instructions that the United States attorney assist in preparation of final title papers. The abstract of title, together with the deeds, as prepared by the United States attorney, were mailed to the Chief of Engineers April 9 and 14, 1898, together with letter explaining the urgent necessity of approval and requesting reply by telegraph. In reply to letter from contractors dated April 6, 1898, stating their readiness to begin operations, they were advised by letter dated April 9, 1898, that deeds had been forwarded to the Chief of Engineers and that it was hoped to receive telegraphic approval thereof the latter part of the following week, in which case work could proceed as prescribed by paragraph 41 of the specifications. April 29, 1898, telegram was received from the Chief of Engineers giving the Attorney General's opinion that the tracts were incumbered by mortgages and unpaid taxes and directing that these incumbrances be removed before accepting deeds, and that when this was done the title would be complete and work might be commenced. May 3 and 4 papers were received by mail from the Chief of Engineers with text of Attorney General's opinion. May 13, letter was received from United States attorney approving abstracts and deeds, mortgage release and tax receipts having been obtained. Contractors began active operations May 12, 1898, on keeper's dwelling and making preparations to excavate for lock pit. June 14 contractors were given written notification that a clear title to land tracts had been obtained and the deeds made matter of record and that work could proceed as prescribed by paragraph 41 of the specifications.

IV.

On May 12, 1898, the claimants began active operations toward the fulfillment of their contract. Between the above date and June 14, 1898, they had proceeded toward completion the following work:

(1) The dredging at Martins Shoals; (2) a well dug for the lock keeper's house; (3) the lock keeper's house so far completed
18 that the workmen were building the chimneys; (4) the grading for the lock site almost completed; (5) the framework of the cofferdam around the lock site completed; (6) material for temporary sheds on the ground; (7) contract for placing concrete in lock walls sublet to subcontractors and the subcontractors on the ground preparing to perform said work. All of which required the assembling of considerable material and the employment of labor.

V.

The war with Spain having begun on April 21, 1898, material of all kinds used in the construction of locks and dams, and labor as well, advanced in price, and claimants were unable to obtain the same at the same prices prevailing prior to said date. The increased cost to claimants of materials used in the construction work under said contract caused by said war was \$5,389.08, and the increased cost of labor employed in the completion of said work was \$4,142.80. It is not shown that the increases so set forth were due to any breach of the contract on the part of the United States. Claimants did not have sufficient storage room and other facilities for storing large consignments of materials.

VI.

The contract, among other things, provided as follows:

(Specifications (40) "The lines and levels for the work will be established on the ground by the engineers, and the contractor must conform and keep thereto."

"137. Description: The work consists in cutting a channel 60 feet wide and to a depth of 4 feet at low water through the shoal.

"The shoal is about 150 feet in length and has from 6 inches to 2 feet of water over the same at time of low water, and is believed to be composed largely of soft sandstone.

"138. Débris: The débris from the shoal must be placed on shore above low-water mark, at such points that it will not again find its way into the river; the points of deposit being subject to the approval of the engineer.

"139. Estimate and measurement: It is estimated that the amount of rock to be removed is 700 cubic yards, and this quantity will be used in canvassing the bids; it is, however, to be considered approximate only; the actual amount will be determined by surveys made before the work is begun and after its completion. Payments will be made per cubic yard of rock in place, and nothing will be paid for beyond the specified limits of excavation."

Claimants completed the work of widening and deepening the channel at said Martins Shoal before the 1st of June, 1898, and in due time were paid the full contract price therefor. About the 1st of August, 1898, it was discovered by the claimants that certain other parts of the channel of said river between Martins Shoal and the lock site were so shallow that at times during low water it was impossible for freighting craft, such as barges loaded to their full capacity, to pass up the river to said dam site. Thereupon said claimants asked the engineer officer of the United States at Portland, Oreg., to consider the question of deepening the channel at said point or points.

Said engineer officer informed the claimants that nothing could be done by him, because there were no funds available for the purpose of doing the work suggested. Claimants thereupon proceeded to widen and deepen the channel at such points

as they deemed necessary for the purpose of making said stream navigable for loaded barges intended for use in connection with the construction of said lock and dam. Said work was done by them voluntarily and gratuitously. No estimates or measurements were made by the United States Engineer Office in connection therewith nor by the claimants. The evidence does not disclose with any certainty the amount of money expended in doing said work.

VII.

In the year 1899, after the completion of the walls of the lock, it was necessary to construct a temporary dam in the bed of the river, in order to divert the flow of the river through the lock chamber, and thus enable the contractor to erect a permanent wing dam, which extended from the wall of said lock to the opposite bank of the river.

Claimants were none of them civil engineers. The firm did not have a civil engineer in their employ in connection with the performance of this contract; they had, however, had some experience as contractors and some experience in the construction of cofferdams, and did have during a part of the time in their employ a superintendent who had had experience in such construction. They asked the local engineer in charge for the United States where the temporary dam should be located, and he indicated a site near the head of said lock, where the river was narrow, as the only suitable and proper place to construct said temporary dam.

Claimants entered upon the construction of said temporary dam at said point in the month of June, 1899. In order to turn the flow of the river through the lock chamber it was necessary to raise the water about 16 feet above its normal flow at that time. They succeeded in closing the first temporary dam and raising the water in the river about 12 feet, when the pressure became so great that the temporary dam broke.

The bottom of the river at said point was of soapstone formation and was inclined to disintegrate after the driving of piles and the admission of water to the stratum of soapstone.

A second and third attempt was made later in the year 1899 to construct said temporary dam at said point. They succeeded in closing the second and third temporary dams, but before the water in the river had been raised to the former elevation obtained—12 feet—said dam broke again on account of the pressure. No further attempt was made to construct said temporary dam until the opening of the working season of 1900.

In the early part of the working season of the year 1900, claimants made application to the engineer in charge for the United States for permission to locate said temporary dam farther down the stream, at a point about 40 feet from the site of the permanent dam; also to cut a hole through the lift wall of the lock chamber, which permission was granted. The dam was afterwards successfully installed at this point.

20 After cutting said hole in the lift wall of the lock chamber it was necessary to raise the water in the river only about 4 feet above its normal flow at that time.

The bottom of the river at said point was of shell rock and soap-stone, of the same character as that where the first two attempts were made to construct said temporary dam, and it would not have been possible to construct the same at said point without the relief afforded by the hole cut through the lift wall of the lock chamber.

The cost of the last two temporary dams was \$3,200.00.

VIII.

Said contract further provided as follows:

"(Specifications) 35. Should the time for the completion of the contract be extended, all expenses for inspection and superintendence during the period of the extension, the same to be determined by the engineer officer in charge, shall be deducted from payments due or to become due to the contractor: Provided, however, That if the party of the first part shall, in the exercise of his discretion, because of freshets, ice, or other force or violence of the elements, allow the contractor additional time, in writing, as provided for in the form of contract, there shall be no deduction for the expenses for inspection and superintendence for such additional time so allowed: Provided further, That nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided for in the form of contract adopted and in use by the Engineer Department of the Army."

It was further provided or suggested by paragraph 41 of the specifications, quoted in Finding II, that in consequence of the annual spring rise of the Willamette River and the resulting overflow into the Yamhill River it was probable that the contractors would not be able to begin work on said lock and dam before June at the earliest. The limit for the time of completing the lock and dam was fixed at December 31, 1898, because it was desired that the work contracted to be done should be completed during the "one low-water season," and the bidders were advised to make their calculations accordingly. The low-water season thus defined was well known to the claimants.

Near the end of the period fixed for the completion of the work claimants requested the United States engineer officer to extend the time for completion so as to include the working season of the year 1899. No suggestion was made by them in their request that they were unable to complete the work because of any freshets, or ice, or other violence of the elements which had occurred during the working season of 1898 or because of delay caused by the United States. The United States engineer officer granted the extension of time requested, but took occasion to expressly advise and inform the claimants that such extension would not absolve them from their obligation to stand the expenses for inspection and superintendence during the period of extension.

The work not having been completed at the end of the working season of 1899, a further request was made for an extension of time so as to include the working season of 1900, which request was granted upon the same conditions as before. The failure to 21 complete the work during the working season of 1899 was not due to freshets, ice, or other violence of the elements.

The United States engineer officer at Portland, Oreg., in settling with the claimants for the work done deducted from the amount due them the sum of \$2,196.27, the amount of expense the United States incurred for inspection and superintendence during the two periods of extension granted.

The amount of such charges (included in the \$2,196.27) which accrued during the time consumed by claimants in constructing the second and third of the temporary dams referred to in Finding VII was \$925.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimants are entitled to recover judgment on Findings VII and VIII in the sum of four thousand one hundred and twenty-five dollars (\$4,125). The petition as to all other items is dismissed.

V. *Opinion.*

BOOTH, J., delivered the opinion of the court.

This is a suit to recover damages for an alleged breach of contract and now comes before the court on the claimants' motion for a new trial and to amend findings. The claimants, Normile, Fastabend & McGregor, copartners, entered into a written agreement to construct a lock and dam in the Yamhill River in the State of Oregon, a keeper's dwelling house and necessary buildings appurtenant thereto, and do a certain amount of dredging in the channel of said river near the lock site. The contract was dated March 11, 1898, approved March 24, 1898, and called for the completion of the work by December 31, 1898.

The controversy is largely one of fact, the legal propositions involved being in a large measure elementary and established.

The first items for which claim is made grow out of the delay in procuring title to the sites for the lock, dam, and keeper's dwelling house by the defendants. Finding II recites the undisputed history of this proceeding. Specification 41 expressly warned the contractors that operations under the contract must await the purchase of sites for the commencement of the work. While celerity of performance was an essential part of the agreement, as evidenced by the dates therein, still there is sufficient in this express condition to anticipate delay. The gravamen of claimants' petition respecting this item is the unexplained delay between May 13, 1898, and June 14, 1898, during which period the whereabouts of the deed seems to be a mystery. On May 13, 1898, the district attorney at Portland ad-

vised Captain Fisk of the clearance of title and the perfection of the conveyance, but the deed was not recorded and no further proceedings respecting the same had until June 14, 1898, one month and one day later. The whole period of time consumed in the consummation of said transaction, from the date of the approval of the contract until the recording of the deed, was two months and twenty days. The last month of this period, under this record, is clearly chargeable to the defendants' neglect, and if shown to have

22 been the proximate cause of the subsequent loss would entitle

claimants to a judgment therefor. Finding IV, however, discloses the fact that claimants disregarded the express conditions of the contract and began active operations under it on May 12, 1898, and proceeded toward its completion with commendable alacrity. It is asserted in their behalf that they "took a chance;" that their efforts minimized the damage, and hence they should not be penalized for so doing. The proposition is apparently sound, but if in assuming a risk in the performance of an agreement the contractor performs without authority that which he is subsequently authorized and empowered to do and the whole work tends to advance and discharge his positive agreement, it must of necessity come within the authorized written contract. In other words, if the record discloses that the delay in securing title to the property did not unduly and unreasonably retard the contractor in the performance of the same, he can not recover. (Little Falls Knitting Co. v. United States, 44 C. Cls., 1.) The contractors herein were obligated to proceed as provided in specification 41, which defined, limited, and explained the conditions surrounding the undertaking. Prior negotiations, expectations, and conversations were all merged into the written agreement and the rights and liabilities of the parties must be determined thereby. (Brawley v. United States, 9% U. S., 168-173.)

It is true that subsequent to the Spanish war prices of both labor and material used in this kind of construction began to advance, and have continued to advance. War was declared on April 25, 1898. There was no delay for which defendants are chargeable prior to May 13, 1898, and this condition would have obtained to a more or less extent despite the delay of one month prior to June 14, 1898.

Claimants were at work under the contract. The findings show that in addition to their inexperience in this particular class of work they were in fact assembling material in the orderly prosecution of the work. They were in no position to receive or care for large consignments of cement or other materials. The delay in the approval of the deed and the notification to proceed with the work was too remote to attribute these losses to that event.

The remaining items resting upon the alleged delay in procuring title to the site necessarily follow the disposition made of the one mentioned in Finding V, and will be dismissed.

The item claimed for under Finding VI is not recoverable under the facts. The work charged for was performed for the express benefit of claimants, and under a distinct understanding that the

defendants had no funds available to pay for same. There was no contract, express or implied, for this particular portion of the work, and no proof as to the expense attendant thereon. The same was voluntary.

The claim under Finding VII has to do with the erection of a temporary cofferdam. It was indispensable to the successful completion of the work that a temporary structure of this sort be erected to enable the completion of the permanent wing dam, which extended from the lock wall to the opposite bank of the river. There were no plans or specifications concerning the character of cofferdam or going into detail of construction; in fact there was nothing said about it in

the contract or specifications. It is conceded, however, that it
23 was a necessary adjunct to the carrying on of the work. Without

it the wing dam could not have been constructed. The engineer officer in charge of the work designated the location of said cofferdam. The claimants proceeded to erect the dam at said location, and were thrice unsuccessful in the attempt. It is manifest from the findings that said location was impossible. Subsequently said cofferdam was relocated and successfully built. The evidence in the record upon which Finding VII has been predicated is quite conflicting. It has not been free from doubt and difficulty. The engineer officer in charge of the work admits suggestions and limited supervision over the site and construction of the cofferdam. The claimants unquestionably acted upon these suggestions as commands. The plans and specifications expressly directed the erection of the cofferdam at a sufficient distance away from the lock as not to endanger the same. The engineer officer in charge was charged with seeing that the location of said cofferdam did not overreach the completed structure. He was in command; his authority under the contract was plenary; he undoubtedly could have prevented the erection of the cofferdam at any point which might interfere with the advancement of the work or at all endanger that already completed. As was said by the court in *Moore, Receiver* (46 C. Cls., 139), No. 27477, decided January 10, 1910: "The Government was largely interested in the performance of the details of this contract from the very beginning of the work. It had agreed that monthly estimates should be made by its engineer in charge as the work advanced, and that 90 per cent of such estimates should be paid to the contractors from month to month. A mere statement of this fact shows that ordinary prudence demanded that the Government should have general supervision of the work as it progressed, and the claimants had agreed to this, as above quoted."

Under all the circumstances in this case it seems hardly possible that the claimants would have three times attempted the erection of a temporary cofferdam in one place unless obligated so to do. The engineer officer in charge was required to use ordinary care and skill in giving directions, and the defendants' liability is limited to such acts as by the use of ordinary care and skill could have been foreseen and prevented. (See *Moore* case, *supra*, and authorities cited.)

The loss occasioned by the failure of the first cofferdam does not come within the rule. There is nothing in the record which would

application for, and give notice of, an appeal to the Supreme Court of the United States.

HUSTON THOMPSON,
Assistant Attorney General.

Filed January 20, 1914.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

Jan. 20, 1914.

27 *VIII. Application for and allowance of cross appeal by claimants.*

Come the plaintiffs, by their attorneys, and pray and give notice of an appeal to the Supreme Court of the United States from so much of the judgment rendered herein on December 1, 1913, as is in favor of the defendants.

BENJ. CARTER,
F. CARTER POPE,
Attorneys for Plaintiffs.

Filed February 18, 1914.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

February 18, 1914.

28 In the Court of Claims.

SIMON NORMILE, JOHN A. FASTABEND, AND WILLIAM F. McGregor, late partners as Normile, Fastabend & McGregor,

vs.

THE UNITED STATES.

No. 28041.

I, John Randolph, assistant clerk Court of Claims, hereby certify that the foregoing are true transcripts of pleadings in said cause; of the findings of fact finally found by the court and the conclusion of law; of the opinion of the court; of the judgment of the court; of the application of the defendants for and allowance of appeal to the Supreme Court of the United States; of the application of the claimants for and allowance of a cross appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and the seal of the court this 18 day of February, 1914.

[SEAL.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Indorsement on cover:) File No. 24090. Court of Claims. Term No. 385. The United States, appellant, *vs.* Simon Normile, John A. Fastabend, and William F. McGregor, late partners as Normile, Fastabend & McGregor. File No. 24091. Term No. 386. Simon Normile, John A. Fastabend, and William F. McGregor, late partners as Normile, Fastabend & McGregor, appellants, *vs.* The United States. Filed March 9th, 1914. File Nos. 24090 and 24091.)

